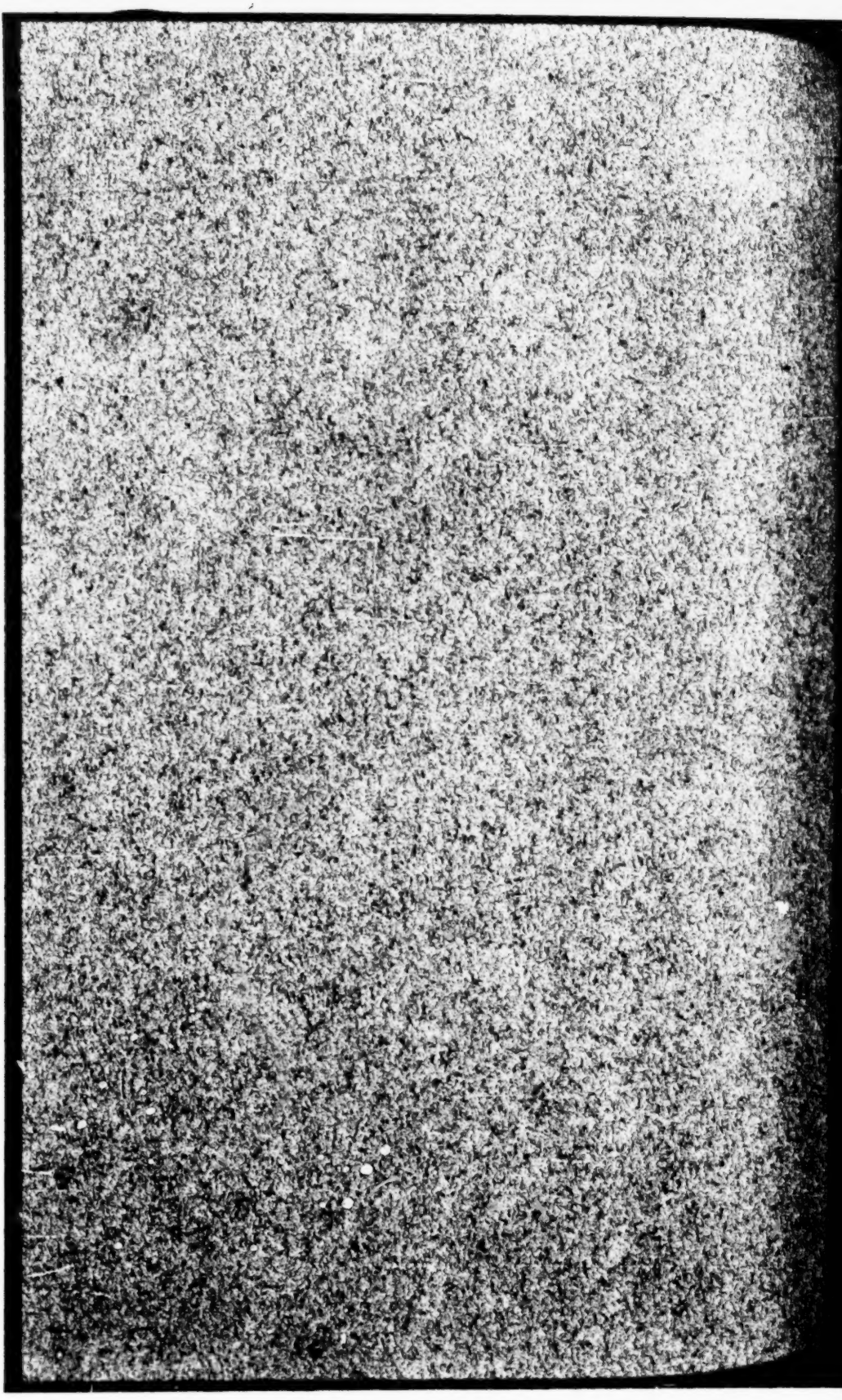

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IN THE

Supreme Court of the United States

October Term, 1929.

No. ~~556~~ 24

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

vs.

BENJAMIN HARRELSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

FRANK S. BRIGHT,
S. L. SWARTS,
MASSEY HOLMES,
Attorneys for Respondents.

The Print Craft Shop, Washington, D. C.

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OPINIONS BELOW.

The opinion of the District Court of the United States for the Western District of Missouri is reported in 28 Fed. (2d) 510, and the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in 35 Fed. (2d) 416.

JURISDICTION.

The Judgment sought to be reviewed was entered on October 3rd, 1929. The jurisdiction of this Court

is found in Section 3(b) of the Act approved February 13, 1925.

QUESTION PRESENTED.

Whether the value of real property situated in the State of Missouri and owned by the decedent at the time of his death is subject to the Federal Estate Tax under the provisions of Section 402 of the Revenue Act of 1918.

STATEMENT.

The case is correctly stated in the Petition, pages 1 and 2.

STATUTE AND REGULATION INVOLVED.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

Treasury Regulations 63, Article 11 (1922 Edition):

> Character of Interest Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent in his lifetime, and which, upon his death, formed his estate.
>
> The test which determines whether the value of a given interest is to be so included, pursuant

to the foregoing provision of the statute, is that stated therein which requires that the property, after death, shall be subject to: (1) payment of the charges against the estate, (2) payment of the expenses of administration, and (3) distribution as a part of the estate.

Treasury Regulations 70, Article 10 (1929 Edition):

Character of Interests Included.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death.

Where the decedent died prior to 10:25 a. m., Washington, D. C. time, February 26, 1926, the test which determines that the value of a given interest is to be included in the gross estate under the provisions of subdivision (a) of the corresponding sections of the Revenue Acts prior to that of 1926, is whether the property, after death, shall be subject to: (1) Payment of the charges against the estate; (2) payment of the expenses of administration; and (3) distribution as a part of the estate. This test is not applicable if the decedent died subsequent to the effective date of the Revenue Act of 1926.

ARGUMENT.

THE CONFLICT WITH THE DECISION OF THE COURT OF CLAIMS DOES NOT MATERIALLY AFFECT THE RIGHTS OF TAXPAYERS NOR EMBARRASS THE GOVERNMENT IN ITS ADMINISTRATION OF THE LAW IN THIS REGARD. IF THIS COURT DECLINES TO GRANT THE WRIT, THE TREASURY DEPARTMENT WILL HAVE AN AUTHORITATIVE RULE FOR ITS GUIDANCE.

In view of the fact that the question involved affects only real property in the State of Missouri, the conflict with the decision of the Court of Claims occasions

no serious consequences to taxpayers in general and none to particular taxpayers in Missouri. The conflict is unlike one between the decisions of two Circuit Courts of Appeal on a question affecting taxpayers throughout the United States. If this Court declines to grant the writ, the decision of the Circuit Court of Appeals of the Eighth Circuit would be an authoritative rule of guidance for the Treasury Department since all cases arising in the District Courts of Missouri and the Board of Tax Appeals involving this question would necessarily be controlled by this decision. If this Court denies the writ, the decision of the Circuit Court will be the law in the Eighth Circuit, which is the only Circuit in which the question is of any interest or importance. Neither is the case one which can ever arise under the present Revenue Laws since Congress eliminated in the Revenue Act of 1926 the three conditions which limited the operation of the prior Acts.

The Petition (page 3) advances the conflict with the decision of the Board of Tax Appeals in Bartlett v. Commissioner, 16 B. T. A. 811 as a reason for granting the writ. This decision was rendered a few days prior to the argument in the case at bar and copies of the opinion of the Board were furnished the Circuit Court of Appeals at the time of the argument by Counsel for the Respondents in this case. The conflict with the Board of Tax Appeals is not a valid reason for granting the writ since appellate jurisdiction from the decision of the Board in the Bartlett case reposes in the Circuit Court of Appeals of the Eighth Circuit.

The liability of real estate in the State of Missouri to the payment of expenses of administration is a question of local law, and since this Court has repeatedly held that it will follow the interpretation

of the courts of a State upon the laws of that State, it would seem that the decision of the District Court of Missouri and the Circuit Court of Appeals affirming it on such a question would have more weight than that of the Court of Claims.

No other cases are pending in the Court of Claims and naturally none will ever again be brought since under existing laws all such cases could be brought either against the United States or the Collector in the District Courts.

There is no conflict here between decisions of two Circuit Courts which would require the granting of the Petition.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS THE CORRECT INTERPRETATION OF SECTION 402(A) OF THE REVENUE ACT OF 1918.

Petitioner concedes (Petitioner's Brief, page 9) that the Circuit Court of Appeals' construction of Section 402(a) is supported by the language of this Court in the decision in United States v. Field, 255 U. S. 257, 262. This Court in explicit terms there decided that the language in subdivision (a) of the Statute was conjunctive and that in order for the value of property to be included in the gross estate under its terms such property must fulfill all the conditions there expressed. It would seem that this pronouncement should have settled the question for all time.

The Treasury Regulations quoted in the Petition (pages 7 and 8), while the ones in force at the time of this decedent's death, are not in fact the regulations involved. Upon the rendition of the decision in the Field case, supra, and because of that decision, these regulations were amended as quoted on page

2 of this Brief so as to require that the property must be subject to the payment of administration expenses, as well as debts, and to distribution, in order that its value could be included in the gross estate. These were the regulations in force at the time respondents sought to secure a refund of the taxes paid on the value of the real estate, and not those quoted by the Solicitor General.

On February 26, 1926, the Revenue Act of 1926 was approved, in which Congress eliminated the three conditions now under discussion. Section 302(a) of the 1926 Act provides:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death."

Thus by eliminating the three conditions expressed in the prior Acts, Congress enlarged the scope of the statute by bringing into the gross estate the value of property which theretofore might not be taxed because it failed to meet the conditions prescribed in the prior Acts.

This is clearly a declaration by Congress of a new intention. (See Shwab vs. Doyle, 258 U. S. 529.)

Regulations 70, Article 10, quoted on page 3 of this Brief, were promulgated in 1929 by the Treasury Department in pursuance of the 1926 and 1928 Acts. Thus it will be seen that the Treasury Department at the time when this case and other cases were pending in the Courts involving the identical question, still interpreted the language of Section 402(a) in support of the construction here contended for by Respondents. The Treasury Department expressly ruled that

where the decedent died prior to February 26, 1926, the property must be subject to payment of administration expenses in order for its value to be included in the gross estate. This construction by the Department has been in force unchanged and unchallenged from 1922 to the present time. While these regulatons of the Treasury Department were in force, Congress re-enacted Section 402(a) without change in the Revenue Acts of 1921 and 1924. The repeated reenactment of a statutory provision without substantial change amounts to an implied legislative recognition and approval of the established executive construction of the statute; Congress being presumed to have legislated with knowledge of the established usage. National Lead Co. v. United States (40 S. Ct. 237, 252 U. S. 140, 3 Am. Fed. Tax Rep. 3042); Burk-Waggoner Oil Assn. v. Hopkins (296 Fed. 492, 4 Am. Fed. Tax Rep. 3851); Schweizer v. Mager (297 Fed. 334, 4 Am. Fed. Tax Rep. 3892).

The correctness of this construction has never been questioned by any Court, so far as Respondents can ascertain, except by the Court of Claims in Steedman v. United States, 63 Ct. Cls. 226. That Court held that Congress did not intend by Section 402(a)—

> "* * * to exclude from taxation all real estate or interest therein which was not subject to the payment of charges against the estate or expenses of administration and subject to distribution, * * * " (See top of page 12 of Petitioner's Brief.)

Since this decision by the Court of Claims, that Court has repudiated its construction as quoted above.

In Nyberg v. United States, 66 C. Cls. 153, decided June 18, 1928, the Court after discussing the nature of the widow's interest in her husband's estate under

the Nebraska law held such interest to be taxable under Section 402(a) of the 1924 Act, saying:

> "Section 402(a), above quoted, mentions three conditions for determining the character of the property, the value of which should be included in the gross estate: (1) That it be subject to the payment of the debts of the decedent; (2) that it be subject to the payment of administration expenses; (3) that it be subject to distribution. The property under discussion was subject to each of these conditions."

A writ of certiorari was denied in this case. Thus it is seen that the Court of Claims in a later decision than the Steedman case has construed the language in Section 402(a) in harmony with the construction placed upon it by the Circuit Court of Appeals in the case at bar.

Petitioner suggests that the qualifying clauses in Section 402(a) were intended by Congress to apply to personal property only. (Petitioner's Brief, page 14). This suggestion is based on the theory that under the ancient common law the word "distribution" was applied to personal property and not to real property, and that Congress was presumed to have known this and used it in its ancient sense. If it were true that Congress had intended to use the word in this sense, then only personal property of an intestate would be taxable and personal property of a testate decedent would escape taxation. Only personal property of an intestate was condidered subject to "distribution" under the rules of the old common law, 18 C. J. 803. That Congress could have intended such a situation is untenable. Moreover the language of the Section under consideration is a single sentence and the qualifying clauses plainly apply to all classes of property enumerated in the first part of the sentence. This same contention was

made by Petitioner in the Court below and was rejected by the Court. (R. 15, 16.)

On page 14 Petitioner states that Congress must be presumed to have known that under the common law real property was not liable either for the payment of debts or administration expenses. If this presumption is tenable, then Congress must also be presumed to have known at the time of the enactment of the 1918 Act that all States of the United States, so far as this Respondent knows, except the State of Missouri, had modified the common law and subjected real estate to the payment of both debts and administration expenses.

On pages 14–16 of Petitioner's Brief it is contended that the report of the Senate Finance Committee on the addition of Section 402(b) of the Revenue Act of 1918, taxing dower, should be accepted as indicating that Congress intended to include dower under the language of Section 202(a) of the 1916 Act. It is argued therefore that the decision of the Court below is erroneous because under it dower would not be taxable under Section 402(a). The extract of the report quoted by Petitioner speaks of the intention of the "framers" of the Act of 1916. If by "framers" the Committee referred to the persons who drafted the Act of 1916, their intention would not be conclusive. It is the intention of the whole Congress that governs. If on the other hand the Committee was referring to the intention of the Congress which passed the Revenue Act of 1916, the Committee's qualifications to speak for the intention of the whole Congress in enacting legislation three years previously would be doubtful to say the least. A similar contention was made by the Government in the case of United States v. Field, supra, and was rejected by

this Court, page 258 of the opinion. Referring to the second part of Petitioner's contention that since under the decision of the Circuit Court of Appeals dower would not be taxable under subdivision (a), such decision does not properly interpret the intention of Congress, this Court's attention is invited to the case of Randolph v. Craig, 267 Fed. 993, decided February 23, 1920. In that case Mr. Justice Sanford, then Judge of the United States District Court for the Middle District of Tennessee, held that dower was not taxable under Section 202(a) of the 1916 Act, saying at page 995:

> "That is as said in Lederer v. Northern Trust Company (C. C. A. 3d. Circ.) 262 Fed. 52, 54, affirming Northern Trust Co. v. Lederer (D. C.) 257 Fed. 812, the tax 'is imposed not upon the interest of the recent owner * * * but upon the transfer of the interest in its devolution.' This is made clear by the express provisions of the act that the tax is imposed 'upon the transfer of the net estate of every decedent' (sec. 201) and that the value of the gross estate is to be determined by 'the extent of the interest therein of the decedent * * * which * * * is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate' (sec. 202)."

This case was not further contested by the Government and the principle there announced was conceded in Treasury Regulations 63 (1922 Edition) Article 16 which provided in part in referring to the dower section of the act:

> "The effect of the provision is to require the inclusion of the full value of the property, without deduction of the value of the interest of the surviving husband or wife. This rule does not apply to the estate of any decedent dying after September 8, 1916, and prior to 6.55 p. m.,

February 24, 1919 (the effective date of Title IV of the Revenue Act of 1918), etc."

Petitioner contends (Petitioner's Brief page 17) that the enactments by Congress of subdivisions (b), (c), (d), (e), and (f) evidence the intent of Congress to include all property transferred at death. These subdivisions (with the exception of (c) relating to transfers during the lifetime of the decedent) were added by Congress at different times subsequent to the original act. It is submitted that they were enacted to reach property which subsequent experience and judicial interpretation demonstrated was not covered by subdivision (a). Congress finally by the Revenue Act of 1926 eliminated the conditions and limitations prescribed in subdivision (a).

It is hard to understand why the petitioner is endeavoring to bring in any interpretations of Section 402(a) by referring to committee reports or other authorities because the rule is definitely fixed that extraneous matters cannot be resorted to in the interpretation of a statute unless there is clearly some ambiguity in the statute, and it would be difficult to find more explicit language than that used by Congress in Section 402(a).

Petitioner concludes with the argument that if it was the intent of Congress to reach all the decedent's real property such intent should not be thwarted by particular rules of property in the several States, and cites United States v. Robbins, 269 U. S. 315, and Burk-Waggoner Oil Association v. Hopkins, 269 U. S. 110, in support of this pronouncement. This argument would be sound if applied to subdivision (a) of the 1926 Act for there it was plainly the intent of Congress to reach all of the decedent's real estate, but the premise is unsound when applied to subdivision (a) of the 1918 Act for there it was plainly the

intent of Congress to reach only such real estate of the decedent as fulfilled the three conditions therein expressed. The only possible criterion for determining whether any given property of the decedent is subject to his debts and to administration expenses and to distribution, is the law of the State governing the devolution of such property. That this is the true criterion was recognized by this Court in United States v. Field, supra. It was recognized by the Court of Claims in Nyberg v. United States, supra, and also by the Circuit Court of Appeals, 3rd Circuit, in Lederer v. Pearce, 266 Fed. 497, wherein the Court said:

> "From the form of the Federal Estate Tax Act, it is evident that Congress intended that the act should operate not in opposition to, but in harmony with the many different State acts, with which, because of its very terms, it would come in contact * * * . Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states. The law of the state being the test of the valid assessment of the tax against given property."

The same criterion was recognized by the Circuit Court of Appeals, 9th Circuit, in Wardell v. Blum, 276 Fed. 226, certiorari denied, 258 U. S. 617, the Court saying:

> "The statute of the United States imposes an inheritance tax upon the transfer of the net estate of every decedent 'to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate.' How is that interest to be determined? Manifestly, we think,

by the law of the state where the property is situate."

((See Keith vs. Johnson, 271 U. S. 1.)

"The decisions of this Court in United States v. Robbins and Burk-Waggoner Oil Association v. Hopkins, supra, have no application to the question here involved. Both decisions dealt with the income provisions of the law, and there was no occasion to consider limitations such as are expressed in the estate tax provisions of the act. In the Robbins case the principle was announced, as Counsel for Respondents understand it, that it was immaterial whether under the local law the wife had an interest in her husband's income, where Congress had the power and had invoked it to tax the income as that of the husband. The principle announced in the Burk-Waggoner case, as we understand it, was that the local law with respect to the status of unincorporated associations, the relation of the shareholders to each other, to the association, and to outsiders, had no bearing upon the power of Congress to determine how and at what rate the income should be taxed.

In its last analysis the contention of the Petitioner is that section 402(a) should be construed as if the restricting conditions were not there. If the contention of Petitioner is correct then the language "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate", is meaningless. This would be an unreasonable conclusion and one not supported by the general rules of construction of legislative enactments.

It is respectfully submitted that the construction placed upon Section 402(a) by the Circuit Court of

Appeals was correct, is supported by the decision of this Court in United States v. Field, supra, by the decision of the Court of Claims in Nyberg v. United States, by the decisions of the Circuit Courts of Appeal of the 3rd and 9th Circuits above quoted, and by the Regulations of the Treasury Department.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS A CORRECT INTERPRETATION OF THE MISSOURI LAW.

Respondents believe that they have demonstrated to the satisfaction of this Court that the construction of the language of Section 402(a) by the Court below was correct. If this be true, then it remains only to determine whether under the administration law of the State of Missouri, real property of a decedent is subject to the payment of the expenses of administration of his estate. This is essentially a question of the law of the State, and this Court has repeatedly stated that it will follow the decisions of the highest courts of a State in the interpretation of its own law.

It will be noted that practically the entire argument of Petitioner is taken up with the construction of the Federal statute and very little attention is given to the question as to whether, under the Missouri law, the real estate is subject to the payment of administration expenses. The Petitioner is contented in this respect with a quotation from the decision of the Court of Claims in the Steedman case (Petitioner's brief, page 16). The only decision cited by that Court in support of its conclusion that the real estate in Missouri was subject to the payment of administration expenses was Howell v. Jump, 140 Mo. 441. This decision, on the contrary, supports Respondent's contention. There the Supreme Court of Missouri held that where the administrator improperly applied the proceeds of the sale of real estate

to the payment of administration expenses, such improper application would not invalidate the sale, since the purchaser was not bound to look to the correct application of the purchase money. It was a recognition of the principle that the proceeds of the sale could not **legally** nor **properly** be applied to administration expenses. This case was considered by the District Court in its decision below (R. 11, 12) and by the Circuit Court of Appeals (R. 19) and both Courts held that it supported Respondents' contentions.

The Circuit Court of Appeals in the instant case has carefully considered the decisions of the State Courts of Missouri and after such consideration has held that real property in Missouri is not subject to the payment of administration expenses. Respondents feel it would greatly serve the convenience of the Court to quote here that portion of the opinion dealing with this subject, but because of its length said quotation is attached hereto as an Appendix.

It is respectfully submitted that the opinion of the Circuit Court of Appeals correctly construed the Missouri law of administration in holding that real estate was not subject to the payment of administration expenses of the estate. It is submitted that the Court of Claims in the Steedman case referred to none of the numerous decisions of the Missouri courts except Howell v. Jump, supra, which case, as found by the Circuit Court, supports Respondents' contention rather than that of Petitioner.

CONCLUSION.

In conclusion it is contended that the decision of the Court below was a correct construction of section

402(a) and a correct interpretation of the Missouri law of administration.

The Federal statute involved has already been construed by this Court, in conformity with the decision of the Court below. The conflict with the decision in the Steedman case, as shown above, has become merely academic, and the Petition should be denied.

Respectfully submitted,

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APPENDIX.

At common law real estate of a decedent was not subject to the payment of his simple contract debts, nor to the payment of legacies, nor to the payment of the expenses of administering the estate. (24 C. J., 459; United States v. Drennen, 25 Fed. Cas., No. 14,992; Titterington v. Hooker, 58 Mo., 593; McQuitty v. Wilhite, 218 Mo., 586, 592.)

Most of the States have by statute changed the common-law rule as relating to debts, and have made the real estate subject to the payment of debts in case the personal property is insufficient for that purpose. Some of the States have by statute made the real estate subject also to the payment of the expenses of administration of the estate. Missouri has by statute modified the common-law rule so far as concerns debts and legacies. Section 141, Revised Statutes of Missouri, 1919, reads as follows:

"Sec. 141. Sale of lands to pay debts.—If any person die and his personal estate shall be insufficient to pay his debts and legacies, his executor or administrator shall present a petition to the proper court, stating the facts, and praying for the sale of the real estate, or so much thereof as will pay the debts and legacies of such deceased person."

In Missouri the common law is in force and effect, except in so far as it has been modified by statute. (R. S. Missouri, 1919, sec. 7048; Lindell v. McNair, 4 Mo., 380; Raume v. Chambers, 22 Mo., 36; Baker v. Crandall, 78 Mo., 584.)

The common-law rule that real estate of a decedent is not subject to the payment of administration expenses is, we think, clearly recognized in Missouri.

In Farrar v. Dean, 24 Mo., 16, 18, the court said:

"The administrator has no power over the real estate, except so far as to hold it for the pay-

ment of the debts of the deceased; and when there are no debts, the land descends to the heirs, or escheats to the State; and it is not in the power of the administrator to hinder this legally; nor can the probate court direct or order a sale of real estate for costs accrued after the administration begins and only because it did begin. Such costs are not debts due by the deceased, nor debts at the time of the death of the intestate."

In Presbyterian Church, etc., v. McElhinney, 61 Mo., 540, 542–3, the Court said:

"Under our statute respecting administration, and the repeated adjudication of this Court thereon, probate courts possess no power to allow any claims against a decedent's estate, or to order the sale of land belonging thereto, except for the payment of the debts of the deceased, i. e., those in existence at the date of his death."

In the case of In re Motier's Estate, 7 Mo. App., 514, 517, the Court said:

"The land belongs to the heirs. It cannot be touched for any of the purposes of administration, except in the specific mode and for the specific objects elsewhere indicated by statute. When real estate is converted into money, whatever surplus remains after a proper application of the objects of the conversion still represents the realty for the benefit of the heirs, and cannot be merged in the personalty for purposes which pertain only to that classification."

In Ritchey v. Withers, 72 Mo., 556, a case in which land was sold by the administrator for the payment of debts, but part of the proceeds was used for the payment of improvements and repairs and for additional allowance to the widow, the Court said (p. 559):

"The county court had no power to order the sale of real estate except for the payment of debts, and when it was sold for that purpose, the proceeds arising from the sale could not be

diverted from it and applied to another and different purpose. The county court could not have ordered a sale of the land for the purpose of paying the administrators for expenses incurred in making improvements thereon nor for the purpose of raising money to appropriate to the widow for her support for twelve months, and it was equally powerless to appropriate to either of said purposes any part of the proceeds derived from a sale of land made to raise money to pay debts."

In State v. Doud, 269 S. W., 923, 924 (Mo. App.), the Court said:

"If the real estate is sold by order of the probate court for the payment of the debts of the decedent, any surplus of the proceeds of the sale remaining after payment of the debts goes to the heir or devisee, and if the heir or devisee has conveyed the real estate the surplus belongs to her grantee. In other words, when real estate is converted into money for the payment of the debts of the decedent, the surplus of the proceeds of the sale remaining, after payment of the debts, retains the character of real estate for the purpose of succession or distribution, and goes to the person in whom the title to the real estate was vested when it was converted."

See also Teverbaugh v. Hawkins, 82 Mo., 180; Garnett v. Carson, 11 Mo. App., 290; In re Estate of Lloyd, 44 Mo. App., 670.

The cases of Elstroth v. Dickmeyer, 88 Mo. App., 418, and Elstroth v. Young, 94 Mo. App., 351, when rightly understood, are in harmony with the foregoing cases. In the Elstroth cases the expenses which were allowed to be paid out of the proceeds of land sold by order of court were the expenses and commissions incurred in or as incidental to the sale of the lands, and were not the ordinary expenses of administration. The distinction is recognized by the Court in the following language in Elstroth v. Young, pp. 355–356:

"The proceeds of the sale of lands made by an order of the probate court in pursuance of the provisions of Chapter 1, Article 8, Revised Statutes, 1899, cannot be used for the purpose of making good deficiencies in the expenses of administration."

In Howell v. Jump, 140 Mo., 441, land was ordered sold to pay debts. The proceeds were applied by the administrator to the payment of the costs of administration and of the sale. The Court recognized the rule in Farrar v. Dean, supra, but held that the sale would not be set aside because of the misapplication of the proceeds.

From the foregoing review of the Missouri authorities we think it is clear that real estate of a decedent in that State cannot be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration. We think it follows that such real estate is "not subject" to the payment of expenses of administration within the meaning of section 402(a). We hold, therefore, that the value of the real estate in question should not have been included in the value of the gross estate of the decedent.